No. 3855

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

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MILLIE L. EVANS, now MILLIE L. JONES, Plaintiff in Error,	
vs.	
J. B. DANIEL, Defendant in Error.	

Brief for Defendant In Error

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Attorney for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR

The question of whether or not abandoned pleadings are admissible in evidence is a **question of evidence and not of practice.** It is not governed by any section of the Nevada Civil Practice Act but is simply a question of law to be settled by the rules flowing from the common law as construed and accepted by the Courts of America. Consequently any argument that Nevada is bound by California decisions because of some similarities in the Civil Practice Act is beside the question and not in point.

> "The overwhelming weight of authority is to the effect that a pleading which has been superseded in an action by an amended pleading is admissible in evidence against the pleader"
>
> H. C. BEHRENS LUMBER COMPANY v LAGER et, al, and note.
> Ann. Cas. 1913 A 1128.

(Approximately 50 cases from 21 different states are cited in the note supporting the rule as stated.)

In Ruling Case Law Vol. 1, page 497, the rule is stated as follows:

> "According to established practice in most jurisdictions a pleading is admissible against the pleader to establish facts alleged therein notwithstanding it has been superseded by an amended pleading. And this is true whether the pleading is verified or not."

Jones on the Law of Evidence (1896 Ed.) Vol. 1 Sec. 274, says:

> "Such written statements (pleadings) are admissible on the same principle as oral admissions, hence it is not necessary that the parties should be the same and

> the pleadings of a party may be received against him **in a subsequent suit although the parties are different.**"

In Section 275 of the same work Mr. Jones says:

> "On the same principle where **amended pleadings** have been filed allegations in the original pleadings have been still held admissible but in such case the original pleadings can have no effect, unless formally offered in evidence."

This matter is the subject of a 70 page note in 14 A. L. R. page 23, where the matter is fully treated and the contentions of the defendant in error upheld. The authors of said note in concluding say:

> "Generally, the rules of evidence apply to pleadings containing admissions against interest in the same manner in which they apply to evidence generally. Indeed, the question of the admissibility of such pleadings is largely one of the application of the ordinary principles of evidence. Much of the seeming difficulty of the subject and many of the differences between the courts may be eradicated by the constant and consistent application

> of evidence rules to the situation in question."

In the case at bar the Plaintiff in Error sought in her answer to the amended complaint to set up an affirmative defense and alleged that the ranch and property in question was at the time of the accident under a verbal lease to her mother, Elizabeth A. Rodgers. (Tr. p. 32.) This verbal lease was supposed to cover ten thousand acres of ranch lands besides personal property. (Deposition of Millie L. Evans Tr. 185 Sixth interrogatory and answer Tr. p. 188.) This unusual arrangement alleged to exist between mother and daughter, Defendant in Error was required to meet. How could he meet it excepting by admissions? If an admission is not competent evidence under such circumstances it is difficult to conceive a set of circumstances where an admission would be. If any other evidence existed it was in the exclusive possession of the Plaintiff in Error and her mother Mrs. Elizabeth A. Rodgers. The answer containing the admission was verified by the Plaintiff in Error personally. (Tr. p. 24.) The ownership of the property and automobile was never denied by the Plaintiff in Error in either answer. The ownership, with the admission in the original answer, was sufficient to estab-

lish the link of proof, and we submit that the Court did not commit error in admitting in evidence the original pleadings containing the admission under oath by the Plaintiff in Error of facts particularly within her knowledge and within her knowledge exclusively. To rule otherwise would be to put a premium upon deception. The original answer of the Plaintiff in Error was voluntarily abandoned, as appears from the stipulation at page 251 of the Transcript.

We submit that no error appears and that the judgment should be affirmed.

Dated at Lovelock, Nevada, October 2nd, 1922.

Respectfully submitted,

BOOTH B. GOODMAN,
Attorney for Defendant in Error.